

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

HEALTH MIDWEST and
MENORAH MEDICAL CENTER, a Single Employer

and

Case 17-CA-21954-1

NURSES UNITED FOR IMPROVED
PATIENT CARE

HEALTH MIDWEST, as a Single Employer with,
LAFAYETTE REGIONAL HEALTH CENTER

and

Case 17-CA-21982-1

VISITING NURSE ASSOCIATION CORPORATION
d/b/a VISITING NURSE SERVICES OF
HEALTH MIDWEST

and

LEE'S SUMMIT HOSPITAL

and

RESEARCH MEDICAL CENTER

and

MEDICAL CENTER OF INDEPENDENCE

and

INDEPENDENCE REGIONAL HEALTH CENTER

and

ALLEN COUNTY HOSPITAL

and

BAPTIST LUTHERAN MEDICAL CENTER

and

OVERLAND PARK REGIONAL
MEDICAL CENTER

and

RESEARCH BELTON HOSPITAL

and

NURSES UNITED FOR
IMPROVED PATIENT CARE,

David A. Nixon, Esq.
for the General Counsel.

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Constangy, Brooks & Smith, LLC,
of Kansas City, Missouri,
for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. A hearing was held in these cases at Overland Park, Kansas, on January 14-15, 2002. The charge in case 17-CA-21954 was filed by Nurses United for Improved Patient Care (the Union) on October 29, 2002, and was amended on December 27, 2002. That charge is against Health Midwest (HMW) as a single employer with Menorah Medical Center (MMC).

The Union filed the charge in case 17-CA-21982 on November 20, 2002. That charge is against HMW as a single employer with Lafayette Regional Health Center (LRHC), Visiting Nurse Association Corporation d/b/a Visiting Nurse Services Of Health Midwest (VNS) ¹, Lee's Summit Hospital (LSH), Research Medical Center (RMC), Medical Center Of Independence (MCI), Independence Regional Health Center (IRHC), Allen County Hospital (ACH), Baptist Lutheran Medical Center (BLMC), Overland Park Regional Medical Center (OPRMC), Research Belton Hospital (RBH), Hedrick Medical Center and Cass Medical Center.

Based on these charges a consolidated complaint issued against HMW as a single employer with MMC, LRHC, VNS, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC, RBH, Hedrick Medical Center and Cass Medical Center.

¹ Visiting Nurse Association Corporation d/b/a Visiting Nurse Services of Health Midwest was named only as VNS, a name it is commonly known by, in the charge and complaint. The name has been corrected.

The complaint against Hedrick Medical Center was severed for decision on October 24, 2003. A separate decision has issued with the redesignated case number of 17-CA-21982-2 and Hedrick Medical Center has been dropped from the caption of this case. On the unopposed motion of the General Counsel, Cass Medical Center was dismissed as a party on January 15, 2003, and has been dropped from the caption.

II. Findings of Fact

A. Jurisdiction

HMW, MMC, LRHC, VNS, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC and RBH (collectively referred to as Respondents) are each engaged in the operation of health care facilities located in either the state of Kansas or Missouri. HMW owns and manages health care institutions, including the other Respondent parties. The Respondents each admit and I find that each meets the Board's standards for asserting jurisdiction and that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The Labor Organization

The Respondent admits and I find that Nurses United for Improved Patient Care (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

C. Background

The pleadings establish that at the times material, MMC, LRHC, VNS, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC and RBH have been a single integrated enterprise with HMW. The record provides little detail regarding the physical facilities, staffing or operations of the Respondents. HMW, MMC, VNS, LSH, RMC, MCI, BLMC and OPRMC, but not LRHC, IRHC, ACH or RBH were respondents in *Baptist Medical Center*, 338 NLRB No. 38, (2002). MMC, LRHC, VNS, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC and RBH apparently became part of the HMW enterprise at different times. Official notice has been taken of the decision in *Baptist Medical Center* and a copy of that decision was made a part of the record in the present case.

Based on the decision in *Baptist Medical*, including the Health Midwest corporate-wide rules in evidence in that case, as well as the record in the present case and inferences based on the evidence, I conclude that MMC, LRHC, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC and RBH are acute-care facilities that have areas like those typically associated with such operations, such as patient treatment areas, hallways, waiting rooms, elevators, patient sitting rooms, public lounges, cafeterias, office areas, parking lots, adjacent sidewalks, and outside walkways.

VNS provides non-acute health care services, primarily at patients' homes. On occasion VNS provides patient care at its facility. The record discloses scant detail regarding the VNS facility. It is located in an office building that houses other entities. There is a cafeteria in the basement of the office building that can be used by VNS employees, but it is not open to the public. The evidence does not establish that there are areas at the VNS facility reserved exclusively for patient care.

D. The alleged unfair labor practices

The complaint alleges that each of the Respondents violated Section 8(a)(1) of the Act by maintaining, since April 30, 2002, rules addressing solicitation, distribution, posting, banners and signs at the Respondents' facilities.

At the hearing it developed that the rules that were actually maintained by the Respondents during the 10(b) limitations period were not uniform for all Respondents and the rules were changed during the 10(b) period. The complaint was amended to conform to the evidence regarding the rules. The Respondents did not oppose the amendment and all parties agreed at the hearing that the rules in evidence regarding solicitation, distribution, posting, banners and signs should be addressed.

The evidence does not show that there has been discrimination in the enforcement of the rules at relevant times. The alleged unfair labor practices are limited to the issuance and maintenance of the rules. The mere maintenance of an overly broad rule restricting Section 7 activity violates Section 8(a)(1) the Act. *Hoyt Water Heating Co.*, 282 NLRB 1348, 1357 (1987).

1. January 2003 Rules

In January 2003, a uniform corporate policy with rules regulating solicitation and distribution was established and the rules were promulgated at HMW, MMC LRHC, VNS, LSH, RMC, MCI, IRHC, ACH, BLMC, OPRMC and RBH (2003 Rules).² The 2003 Rules were in effect at the time of the hearing. In all material respects the provisions of these rules were the same. Accordingly, the 2003 Rules will be considered as a group. The provisions of the 2003 Rules at Allen County Hospital are representative. The rules are found in a memorandum that reads as follows:

Allen County Hospital

CORPORATE POLICY — HUMAN RESOURCES

SUBJECT: Solicitation and Distribution

Section:	Employment
Policy Number:	400-300-30
Effective:	9/15/92
Revised:	1/8/03

PURPOSE

To outline the criteria for solicitation and distribution on the premises of Allen County Hospital.

² The rules announced at BLMC, RBH AND RMC were on a single human resources department memo with the heading "Health Midwest Central Region", as were earlier solicitation and distribution rules discussed infra. The distinction between facilities in this apparent administrative division of HMW and other facilities is not material. The Health Midwest Central Region memos also names Research Psychiatric Center and Trinity Lutheran Manor. The General Counsel does not seek findings regarding those entities.

SCOPE

- 5 This policy applies to all employees of Allen County Hospital. However, it does not affect employees who have certified a union as their exclusive bargaining representative, unless agreed to by management and the union.

POLICY

- 10 Solicitation or Distribution of literature or other materials during working time within Allen County Hospital is strictly prohibited.

I. Solicitation

- 15 Solicitation during working time is strictly prohibited. During non-working time, solicitation is prohibited in immediate patient care areas, such as patient rooms, patient sitting rooms, recovery rooms, operating rooms, x-ray and therapy areas, treatment areas, and hallways adjacent to immediate patient care areas.

- 20 Non-employees are prohibited from any soliciting at Allen County Hospital.

II. Distribution

- 25 Distribution of literature or other materials during working time is strictly prohibited. During non-working time, distribution is permitted only in non-work areas. Non-work areas include the cafeteria, gift shop, employee lounges, employee break areas, vending areas, lobbies, and parking areas. Employees may use internal mailboxes for distribution as long as this use does not prevent distribution of hospital information.

- 30 Non-employees are prohibited from distributing materials of any kind on Allen County Hospital property without prior approval of management.

III. Posting

- 35 Employees may post flyers and notices on bulletin boards the facility has provided for employee use. Employees may also post flyers or notices in any other location where a department allows posting of non-hospital materials. All posting must be limited in such a way as to leave space for others to post items of their choosing. In all other areas posting is prohibited.

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IV. Banners and Signs

- 45 Except as provided in the above section on "Posting," employees may not set up banners, signs, balloons or other paraphernalia on facility buildings, doors, windows, or walls. This rule does not prohibit lawful picketing upon proper notice.

V. Solicitation, Distribution and Posting at Other Health Midwest Facilities

- 50 Employees may engage in Solicitation, Distribution, and Posting activities at other Health Midwest facilities but must comply with the provisions of this policy. For security purposes, employees engaged in Solicitation, Distribution, and Posting activities at another Health Midwest facility must display their Health Midwest name badge.

The 2003 Rules were distributed to the employees, posted on bulletin boards and placed in policy manuals. There is no evidence that following the promulgation of the 2003 Rules they were ever affirmatively invoked or enforced in response Section 7 activity by any employee or in response to solicitation by any non-employee union representative. Thus, what is at issue is confined to the promulgation and maintenance of the 2003 Rules.

a. Non-employee solicitation and distribution under the 2003 Rules

(1) The *Jefferson Chemical* defense

The General Counsel contends that the issuance and maintenance of the 2003 Rules prohibiting non-employee solicitation and distribution violate Section 8(a)(1). After the General Counsel rested, the Respondents moved for dismissal regarding the prohibition of non-employee solicitation and distribution in the 2003 Rules, asserting that the government is estopped from litigating the language because the General Counsel had the opportunity to litigate the language in *Baptist Medical Center*, 338 NLRB No. 38, (2002).³ I deferred a decision on the motion until post-hearing briefs were filed. The motion was renewed on brief. At the hearing and on brief the Respondents' rely on the rationale of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), where the Board held that the General Counsel's litigation of an 8(a)(5) complaint alleging specific unilateral changes precluded the General Counsel's later attempt to litigate in a separate proceeding a surface bargaining complaint arising out of the same course of bargaining.

The ban on non-employee solicitation and distribution is found in versions of policies in effect at the time of the hearing in *Baptist Medical Center*. The respondents in *Baptist Medical Center* included 8 of the 12 respondents in the present case, including HMW. In *Baptist Medical Center* the judge found that HMW maintained a corporate-wide no-solicitation /no-distribution policy that provided, "Persons not employed by Health Midwest . . . may not solicit or distribute literature on Health Midwest . . . property. . . ." The judge considered that policy in relation to issues concerning solicitation by employees at facilities other than the one where they worked. The judge concluded that their access rights were those of employees and governed by *Tri-County Medical Center*, 222 NLRB 1089 (1976). The General Counsel did not contend in *Baptist Medical Center* that the restrictions on solicitation and distribution were unlawful because they limited access by non-employee union representatives.

An initial issue is whether the *Jefferson Chemical* defense was timely raised. The *Jefferson Chemical* defense is an affirmative defense that was not raised in the Respondents' answer. The complaint did not, however, specify that the General Counsel intended to challenge the rule that was substantially identical to the one in evidence in *Baptist Medical Center*. Rather, the complaint alleged in only conclusionary terms that the entire set of rules violated Section 8(a)(1). There is no relevant Board decision where the Board has found that an employer who maintains a facially neutral rule prohibiting non-employee soliciting and distributing of literature on employer property, without more, violates Section 8(a)(1). In these circumstances there was an insufficient basis to put the Respondents on notice when filing their answer that the General Counsel would contend that the restrictions on non-employees were unlawful on their face. The General Counsel has not contended that the motion is untimely, has claimed no prejudice by the

³ A *Jefferson Chemical* defense was not raised regarding solicitation and distribution rules promulgated outside the 10(b) period, but maintained during the 10(b) period. I decline to consider *Jefferson Chemical* in relation to those rules, which are considered infra.

timing of the motion to dismiss and I find there was none. I conclude that the *Jefferson Chemical* defense was timely raised. See, *Frontier Hotel and Casino*, 324 NLRB 1225 (1997).

On the facts of the present case, I conclude that the government is not estopped from litigating the language in the 2003 Rules prohibiting non-employee solicitation and distribution. The promulgation of the 2003 Rules at issue occurred after the close of the hearing in *Baptist Medical Center*. The promulgation of the revised rules that included a prohibition of non-employee solicitation and distribution were new acts and conduct. See *Service Employees Union, Local 87*, 324 NLRB 774 (1997). Accordingly, dismissal under *Jefferson Chemical* is not warranted. See *Great Western Produce*, 299 NLRB 1004, fn. 1(1990).

(2) The lawfulness of the rule excluding non-employees

The General Counsel argues that the issuance and maintenance of the 2003 Rules prohibiting non-employee solicitation and distribution violated Section 8(a)(1). The General Counsel argues that based upon *Bristol Farms*, 311 NLRB 437 (1993); *Indio Grocery Outlet*, 323 NLRB 1138 (1997); and *Food for Less*, 318 NLRB 646 (1995), Respondents had a burden, which they did not carry, to prove that they had a sufficient property interest under state law to maintain the rule.

Respondents contend that an employer may lawfully prohibit non-employee union organizers access to its property for solicitation and distribution, absent a showing that on-site employees are otherwise inaccessible through reasonable efforts, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992); and *Intercommunity Hospital*, 255 NLRB 468, 469-470 (1981). Respondents assert that the General Counsel made no showing that Respondents' employees are inaccessible and that the 2003 Rules' language regarding non-employee solicitation and distribution is accordingly lawful. The Respondents go on to argue that there is an absence of authority for the violation urged by the General Counsel.

The evidence does not establish precisely who is permitted to enter the Respondents' facilities or what security measures are employed to regulate entry. There is no evidence that the Respondents do not have exclusive possession and control of the property where the 2003 Rules are applicable. There is no evidence that employees are inaccessible off-site through reasonable efforts. There is no evidence that Respondents discriminate against non-employee union solicitation and distribution by permitting other non-employees to solicit and distribute. There is no evidence regarding Respondents' property rights under state law that would privilege them to deny access by non-employee union representatives.

In *Wild Oats Markets*, 336 NLRB 179, 180 (2001), the Board stated:

It is well established that an employer may properly prohibit solicitation/distribution by non-employee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union

representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. See *Indio Grocery Outlet*, 323 NLRB 1138, 1141-1142 (1997), *enfd.* 187 F.3d 1080 (9th Cir. 1999), *cert. denied* 529 U.S. 1098 (2000); *Food For Less*, [318 NLRB 646, 649-650 (1995)]; *Bristol Farms, Inc.*, 311 NLRB 437, 438-439 (1993). In determining the character of an employer's property interest, the Board examines relevant record evidence -- including the language of a lease or other pertinent agreement--in conjunction with the law of the state in which the property is located. See *Food For Less*, *supra*, at 649.

If Respondents have a burden to prove that they had a sufficient property interest under state law to maintain the rule on non-employee solicitation, a violation is proven, since Respondents introduced no evidence of such a property interest. Conversely, if the General Counsel has not established that the burden is on Respondents to prove that maintenance of the rule was privileged under state law, there is no violation because the rule would be privileged under *Lechmere*, since there is no evidence that Respondents discriminatorily applied the rule or that there are not other legally sufficient channels of communication available to non-employee union representatives.

Trespassing on private property is unlawful in all states. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 286 (1993). An employer may validly post its property against non-employee union activity. *Lechmere*, above at 538; *Babcock & Wilcox*, above at 112. The Board has never found that the mere maintenance of a facially neutral rule excluding non-employee solicitors from an employer's property violates the Act.

In the post-*Lechmere* decisions involving the right to exclude non-employee union representatives, individuals had actually been excluded and there were objective circumstances that presented a purported or asserted conflict between the exercise of Section 7 rights and private property rights. In such circumstances the Board has imposed a burden on employers to prove their property rights are superior under state law. *Wild Oats*, *supra*; *Corporate Interiors, Inc.*, 340 NLRB No. 85 (2003); *A&E Food Co. 1*, 339 NLRB No. 104 (2003); *Wolgast Corp.*, 334 NLRB 203 (2001); *Snyder's of Hanover, Inc.*, 334 NLRB 183 (2001); *Farm Fresh, Inc.*, *supra*; *Lincoln Center for the Performing Arts*, 340 NLRB No. 134 (2003). Where a violation is found, the remedy ordered by the Board is tailored to the particular circumstances.

The Board decisions where the employer was found to have a burden to prove its exclusory property rights under state law involved areas such as sidewalks, shopping malls, entrance areas, parking lots, bus stops, common situs projects and other locations that had characteristics of a public place or a place where the employer's property rights were attenuated. An employer's exclusory right in such circumstances may be limited by leases, contracts, easements, laws and court decisions. The Board's determinations of the employers' exclusory rights have been fact specific, involving particular locations and circumstances. In contrast, the burden the General Counsel urges be imposed in this case would require an employer to defend its facially neutral rule excluding non-employee solicitors in a multitude of hypothetical situations. Alternatively, an employer that wished to exercise its rights under *Lechmere* would be required to publish and maintain detailed regulations covering all contingencies.

The General Counsel contends, in substance, that there is a rebuttable presumption that an employer who maintains a facially neutral rule excluding non-employee solicitors from employer property, without more, violates Section 8(a)(1). *Wild Oats Markets* and similar cases

do not dictate this result. The Board has not imposed a burden on employers to prove an exclusory right based on state law in the absence of evidence of an actual exclusion, coupled with a purported conflict between Section 7 rights and private property rights. The contention of the General Counsel raises significant legal issues and fundamental policy issues that have not been addressed by the Board. No convincing argument has been advanced in support of the General Counsel's position. I conclude that the unlawfulness of the rule has not been proven.⁴

b. Employee solicitation and distribution restrictions in the 2003 Rules

The 2003 Rules prohibit employee solicitation and distribution during working time and prohibit the distribution of literature in working areas. These restrictions are not facially unlawful. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1954). The 2003 Rules also prohibit employee solicitation, even on non-working time, in immediate patient care areas. A hospital may prohibit all solicitation in immediate patient care areas. *Beth-Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *Brockton Hospital*, 333 NLRB 1367 (2001); *Alle-Kiski Medical Center*, 339 NLRB No. 44 (2003). Patient rooms, patient sitting rooms, recovery rooms, operating rooms, x-ray and therapy areas, treatment areas, and hallways adjacent to immediate patient care areas, referred to in the 2003 Rules, are areas where the prohibition of solicitation is presumptively lawful. I conclude that the restrictions on employee solicitation and distribution contained in the 2003 Rules do not violate Section 8(a)(1). In reaching this conclusion, I attach little significance to the absence of evidence that VNS has areas reserved for patient care.

(1) Restrictions on posting, banners and signs in the 2003 Rules

On brief the General Counsel acknowledges that with the exception of the last sentence, the 2003 Rules addressing employee postings are not unlawful. This is consistent with Board law. See *Doctors' Hospital of Staten Island, Inc.*, 325 NLRB 730, 736 (1998); *Honeywell, Inc.*, 262 NLRB 1402 (1982); *St. Anthony's Hospital*, 292 NLRB 1304 (1989).

The final sentence regarding posting that is challenged states, "In all other areas posting is prohibited." The General Counsel contends that this restriction "encompasses the prohibitions" on banners and signs. In support of the contention that the restrictions on posting, banners and signs are facially unlawful, the General Counsel relies on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) and the judge's opinion in *Baptist Medical Center*, 338 NLRB No. 38, slip op. at 34-35. (2002). *Eastex* is not dispositive. The right of Respondents' employees to distribute literature in non-work areas is endorsed in the provision regarding distribution.

Because there were no exceptions to the judge's opinion in *Baptist Medical Center* regarding this issue, I am not bound by it. I have nevertheless reviewed the portion of that decision relied on by the General Counsel to determine whether it is persuasive. The judge in that case found that RMC had violated Section 8(a)(1) by restricting the setting up of display tables and chairs and the posting of signs in a cafeteria. However, the judge in *Baptist Medical Center* based his decision on facts that are absent in the present case. The judge relied principally on the absence of a rule like the one alleged to be violative in the present case. The judges' opinion in *Baptist Medical Center* is consistent with a conclusion that the promulgation

⁴ While not relied on in reaching my conclusion regarding the nonemployee solicitation rule, Respondents may have a presumptive right to exclude nonemployee union representatives from the interior of the facilities without reference to state law. See *Tri-County Medical Center*, 222 NLRB 1089 (1976).

and maintenance of the 2003 Rules restricting posting, banners and signs did not impermissibly restrict Section 7 activity. I conclude that the General Counsel has not established that the those restrictions violated Section 8(a)(1).

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(2) Restrictions in the 2003 Rules regarding solicitation, distribution
and posting at other Health Midwest facilities

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The General Counsel contends that all of the language in the 2003 Rules regarding solicitation, distribution and posting at other Health Midwest facilities is unlawful. The General Counsel contends that the rule is unlawfully ambiguous and implicitly limits the activity of non-employees. I find that the rule is not ambiguous and that it does not address, implicitly or otherwise, the activities of non-employees.

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The requirement that employees wear their identification badges is not unlawful in the circumstances of this case. The employer has a lawful general rule excluding non-employee solicitors, including union representatives. The requirement that employees identify themselves as persons entitled to solicit in the hospital is consistent with the exercise of the Respondents' right to exclude non-employees. The Respondents have not excluded off-duty employees from hospital buildings, as they might have an arguable right to do under *Tri-County Medical Center*, 222 NLRB 1089 (1976). Under the circumstances the badge requirement is reasonable, given the Respondents' property rights and legitimate security concerns.

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2. The rules in effect prior to the 2003 Rules

The 2003 Rules were issued only days before the hearing. For the reasons discussed above, the 2003 Rules are not unlawful. The Respondents argue that because the earlier policies were superseded by the 2003 Rules, the issues regarding the lawfulness of earlier policies are moot and should not be considered. This contention has no merit.

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An employer can sometimes relieve itself of liability for unlawful conduct by repudiating the conduct. Effective repudiation requires that it be timely, unambiguous, specific to the coercive conduct, free from other unfair labor practices, adequately published to all employees, and set forth assurances that no further interference with Section 7 rights will occur. *Passavant Memorial Hospital*, 237 NLRB 138, 138-139 (1978). The eleventh hour issuance of the revised rules is insufficient alone to meet the *Passavant* criteria.

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For reasons discussed infra, the earlier rules violated the Act in some respects. Some of the earlier rules had essentially the same provisions and will be addressed together. The General Counsel argues that the 2003 rules did not rescind the prior rules and that they accordingly continued in effect. This argument is unconvincing. The 2003 rules are a complete revised statement of the Respondents' solicitation and distribution rules and the 2003 rules superseded the earlier rules. The employees are unlikely to be confused. Moreover, the remedy for the violations found includes a statement in the notice to employees that the earlier rules were withdrawn and superseded by the 2003 rules.

a. The 2001 - 2002 Rules

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During October, November, and December 2001, and in January 2002, a no solicitation/distribution policy with rules regulating solicitation and distribution was promulgated at IRHC, OPRMC, MMC, and MCI. On February 2, 2002, HMW promulgated a corporate policy with essentially the same rules as those at IRHC, OPRMC, MMC, and MCI. These HMW rules superseded a September 1992 policy. During the next two weeks the rules in this corporate

policy were incorporated into policy statements with rules regulating solicitation and distribution that were promulgated at LSH, VNS, BLMC, RMC and RBH. These policies and rules will be referred to as the 2001 - 2002 Rules. The 2001 - 2002 Rules were adopted outside the 10(b) period, but following their promulgation they were maintained during the 10(b) period, until they were superseded by the 2003 Rules.

The MMC policy is representative of the 2001 - 2002 Rules and in all material respects is the same as those promulgated at HMW, IRHC, OPRMC, MCI, LSH, VNS, BLMC, RMC and RBH. The relevant portions of the policy are as follows:

Solicitation

Solicitation during working time is strictly prohibited. During non-working time, solicitation is prohibited in immediate patient care areas and in areas where solicitation would be likely to disrupt patient care. Thus, solicitation is prohibited in the following areas: patients' rooms; operating rooms, recovery rooms; nurses' stations, medication islands; x-ray and therapy areas; treatment rooms; hallways adjacent to previously listed immediate patient care areas; patient sitting rooms; elevators, hallways, stairs and building entrances that are used predominantly for patients and emergency equipment; and any other areas where patients regularly receive care. For purposes of this policy, these areas are referred to as "Patient Care Areas."

Employees on non-working time may solicit other employees on non-working time in all areas, which are not Patient Care Areas. Solicitation is prohibited if it disrupts the regular functions of the facility.

Non-employees are prohibited from all solicitation at Menorah Medical Center.

Distribution

Distribution of literature or other materials during working time is strictly prohibited. During non-working time, distribution is permitted in any non-working area. Working areas include all Patient Care Areas and all other areas reserved for work purposes, office areas and conference rooms. Distribution is also prohibited if it disrupts the regular functions of the facility. Employees may use internal mailboxes for distribution so long as this use does not prevent distribution of hospital information.

Non-employees are prohibited from distributing materials of any kind on Menorah Medical Center's property without approval of management. Approval will be granted only for Menorah Medical Center's purposes.

Posting

Employees may post flyers and notices on bulletin boards the facility has provided for employee use. Employees may also post flyers or notices in any other location where a department allows posting of non-hospital materials. All posting must be limited in such a way as to leave space for others to post items of their choosing. Thus, no one employee or group should take up a large portion of a bulletin board or other area where notices are regularly posted. In all other areas posting is prohibited.

Banners and Signs

Except as provided in the above section on "Posting," employees may not set up banners, signs, balloons or other paraphernalia on facility buildings, doors, windows, walls, tables, chairs or other property. This rule does not prohibit lawful picketing upon proper notice.

Solicitation, Distribution and Posting at Other Health Midwest Facilities

Employees may engage in Solicitation, Distribution and Posting activities at other Health Midwest facilities, but must comply with all provisions of that facility's policy while doing so. A copy of the facility's policy may be obtained from that facility's human resources department. For security purposes, employees engaged in Solicitation, Distribution and Posting activities at another Health Midwest facility must prominently display their Health Midwest name badge and identify themselves upon request to security or staff personnel as an employee of this facility.

The restrictions in the 2001 - 2002 Rules regarding non-employees, the restrictions on solicitation, distribution and posting at other Health Midwest facilities, the restrictions on posting and the restrictions on banners and signs do not facially violate Section 8(a)(1), for the reasons discussed earlier regarding similar restrictions in the 2003 Rules. The restrictions on activity by employees at other Health Midwest facilities do incorporate by reference restrictions at those other facilities that are addressed below.

The restrictions in the 2002 Rules relating to solicitation violate Section 8(a)(1) in certain respects. An employer is permitted to prohibit solicitation during working time. Such restrictions in the 2002 are not facially unlawful. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1954). A hospital may prohibit all solicitation in immediate patient care areas. *Beth-Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979). Thus, solicitation may be prohibited in patient rooms, patient sitting rooms, recovery rooms, operating rooms, x-ray and therapy areas, treatment areas, and hallways adjacent to immediate patient care areas. See the discussion supra regarding the 2003 Rules.

The other specified locations where solicitation is prohibited under the 2002 Rules are not presumptively immediate patient care areas. Regarding such areas an employer has the burden of affirmatively proving that they are areas where solicitation may be prohibited. This the Respondents have not done. I shall accordingly recommend that the Respondents be found to have violated Section 8(a)(1) regarding the prohibition of solicitation at nurses' stations, medication islands, hallways adjacent to those areas, elevators, hallways, stairs and building entrances. The prohibition of solicitation in "areas where solicitation would be likely to disrupt patient care", especially when read in the context of the specific restrictions on solicitation found to be unlawful, would tend to interfere with employees' exercise of their Section 7 rights and therefore violated Section 8(a)(1).

The restrictions on distribution also violate Section 8(a)(1) in certain respects. An employer is permitted to prohibit distribution of literature during working time and in working areas. Such restrictions in the 2002 Rules are not facially unlawful. *Stoddard-Quirk Mfg. Co.*, supra; *Republic Aviation Corp.*, supra. The prohibition of distribution in "patient care areas" must, however, be read in conjunction with the definition of "patient care areas" that I have concluded are, in part, unlawful. The record does not establish that hallways adjacent to nurses' stations and medication islands, elevators, hallways, stairs, building entrances and undefined "areas

where solicitation would be likely to disrupt patient care” are working areas. Accordingly, I shall recommend that the distribution rule be found to violate Section 8(a)(1) to the extent it applies to those areas. I decline to reach the same conclusion regarding nurses’ stations and medication islands because the weight of the evidence is that they are work areas. The prohibition on distribution “if it disrupts the regular functions of the facility”, especially when read in the context of the specific restrictions on distribution found to be unlawful, would tend to interfere with employees’ exercise of their Section 7 rights and therefore violated Section 8(a)(1).

b. The LRHC rules prior to the 2003 Rules

The solicitation and distribution rules in effect at LRHC prior to the 2003 Rules were issued in 1993 and were maintained during the 10(b) period, The LRHC rules include the following provisions:

PURPOSE:

To prevent disruption/disturbance of the daily hospital operations or the rendering of patient services.

PROCEDURES:

The following guidelines are established:

- No employee shall solicit for any purpose during working hours.
- No employee shall solicit for any purpose in immediate patient care areas such as patient rooms, operating rooms or patient treatment areas. In addition, areas used for physician consultation a meetings with families/friends shall not be used.
- Canvassing on hospital premises is prohibited. No one may solicit funds, supplies or equipment, or sell tickets for functions on hospital grounds without prior approval of the Administrator/designee.
- Soliciting by distribution of written material on behalf of any organization is prohibited without prior approval of the Administrator/designee.

...

NOTE: DEFINITIONS

Working areas - all areas except cafeteria, gift shop, employee lounges, lobbies and parking areas.

Working time - working time encompasses both the employee performing the solicitation and the directed employee during the Solicitation/distribution process. Working time does not include break periods, meal times or any specified periods during the workday when employees are not properly engaged in their work tasks.

These rules prohibit solicitation during “working hours”, which the Board views as including break and lunch times, when employees have the right to solicit. This may have been an inadvertence. The written rules define “working time” and LRHC possibly intended to prohibit solicitation only on working time. Such ambiguity is construed against the employer. *Grouse*

Mountain Lodge, 333 NLRB 1322, 1331-1332 (2001). Accordingly, the prohibition of employee solicitation during “working hours” violates Section 8(a)(1). See *Our Way, Inc.*, 268 NLRB 394 (1983).

5

The rules prohibit “soliciting by distribution” without management approval, in violation of Section 8(a)(1). See *Lake Holiday Manor*, 325 NLRB 469, 478 (1998).

10

The prohibition of “canvassing” on hospital property is so broad as to include a prohibition of protected Section 7 activity and accordingly violates Section 8(a)(1). *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1954).

15

The prohibition of solicitation in areas used for physician consultation and meetings with families and friends is not an area of the hospital where solicitation bans are presumptively privileged and the record evidence does not show that these are areas at LRHC where Section 7 activity by employees may be prohibited. Accordingly, this provision violates Section 8(a)(1). *Beth-Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979).

20

The definition of “working areas” may be excessively narrow, however, there are no restrictions in this policy regarding protected activity in working areas. Accordingly, the definition in the context of these rules is not facially unlawful.

c. The ACH rules prior to the 2003 Rules

25

The rules applicable at ACH prior to the 2003 Rules were promulgated in 1992 and were maintained until they were supplanted by the 2003 Rules. These rules include the following provisions:

30

PURPOSE:

To prevent disruptions in operations, interference with patient care and inconvenience to patients and visitors.

35

POLICY:

Solicitation and distribution within Health Midwest, Health Midwest Development Group and Health Midwest Ventures Group facilities⁵ must be approved by the corporation and conducted according to specified procedures.

40

A. Non-Employee Solicitation

45

Persons not employed by Health Midwest, Health Midwest Development Group or Health Midwest Ventures Group may not solicit or distribute literature on Health Midwest, HMDG or HMVG property for any purpose at any time, unless prior proper authorization from the Health Midwest Vice President for Human Resources has been obtained in writing.

50

⁵ This included Allen County Hospital at the relevant times during the 10(b) period.

B. Employee Solicitation

1. Working time

Except for solicitation for official Health Midwest, HMDG or HMVG sponsored employee programs, no employee shall solicit any other employee of these corporations during working time, nor shall any employee distribute any literature during working time.

2. Non-Working Time

No employee shall solicit any other employee of Health Midwest, HMDG or HMVG or distribute any literature during non-working time in those areas in which patients and/or visitors have access.

a. This prohibition on solicitation and distribution during non-working time includes patient treatment areas, hallways, waiting rooms, elevators, patient/public lounges and office areas.

b. Those areas in which employees may engage in solicitation and distribution during non-working time are the employee lounges, employee restrooms, employee locker room, parking lots and cafeteria.

3. Employees may engage in solicitation of or distribution to other employees only when both employees are on non-working time, such as break periods or meal periods, and only in areas to which patients and visitors do not have access.

4. Employees may not bring goods or services onto the premises for sale to other employees.

C. Solicitation of Patients/Visitors

Solicitation of patients or visitors and/or distribution of any matter to patients or visitors for any purpose by any employee is prohibited at all times.

D. Enforcement of Policy

1. This policy will be strictly enforced~

2. Violation of this policy will result in disciplinary action.

The ACH rules violated Section 8(a)(1) in several respects. The requirement for management approval of solicitation and distribution violates Section 8(a)(1). *Brunswick Corp.* 282 NLRB 794 (1987).

A hospital may prohibit solicitation in immediate patient areas, such as patient rooms, patient sitting rooms, recovery rooms, operating rooms, x-ray and therapy areas, treatment areas, and hallways adjacent to immediate patient care areas. *Beth-Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979); *Brockton Hospital*, 333 NLRB 1367 (2001); *Alle-Kiski Medical Center*, 339 NLRB No. 44 (2003). The limitations regarding where ACH employees may solicit are more extensive than the locations that are presumptively patient care areas and the Respondents have presented no evidence that would

privilege the more extensive restrictions on solicitation. Accordingly, I conclude that the rules violate Section 8(a)(1) by prohibiting solicitation in hallways, waiting rooms, elevators, lounges, office areas and areas in which patients and/or visitors have access. These rules further violate
 5 Section 8(a)(1) by defining the locations where solicitation is permitted as being employee lounges, employee restrooms, employee locker room, parking lots and cafeteria. In the context of the unlawful limitations on solicitation, employees could reasonably conclude that solicitation was permitted only in those locations.

10 A hospital may prohibit distribution of literature in patient care areas and in work areas. *Beth-Israel Hospital*, supra; *Baptist Hospital, Inc.*, supra; *Stoddard-Quirk Mfg. Co.*, supra; *Republic Aviation Corp.*, supra. The ACH rules prohibit employee distribution to areas that the record does not establish are work areas. The Respondents have the burden of proof to establish that it is privileged to prohibit otherwise protected Section 7 in particular locations.
 15 Accordingly, the ACH rules violated Section 8(a)(1) by prohibiting distribution in areas that have not been shown to be immediate patient care areas or work areas. These areas include hallways, waiting rooms, elevators, lounges, office areas (which may include non-work areas) and areas in which patients and/or visitors have access. These ACH rules further violate
 20 Section 8(a)(1) by defining the locations where distribution is permitted as being employee lounges, employee restrooms, employee locker room, parking lots and cafeteria. In the context of the unlawful limitations on distribution, employees could reasonably conclude that distribution was permitted only in these locations.

25 Finally, the ACH rules violate Section 8(a)(1) by prohibiting, without limitation, definition or evidence of justification, solicitation of visitors for any purpose. *Republic Aviation Corp.*, supra.

Conclusions of Law

30 1. Health Midwest, Menorah Medical Center, Lafayette Regional Health Center, Visiting Nurse Association Corporation d/b/a Visiting Nurse Services Of Health Midwest, Lee's Summit Hospital, Research Medical Center, Medical Center Of Independence, Independence Regional Health Center, Allen County Hospital, Baptist Lutheran Medical Center, Overland Park Regional Medical Center, and Research Belton Hospital are each an employer engaged in commerce
 35 within the meaning of Section 2(2), (6), and (7) of the Act.

40 2. At all times material Menorah Medical Center, Lafayette Regional Health Center, Visiting Nurse Association Corporation d/b/a Visiting Nurse Services Of Health Midwest, Lee's Summit Hospital, Research Medical Center, Medical Center Of Independence, Independence Regional Health Center, Allen County Hospital, Baptist Lutheran Medical Center, Overland Park Regional Medical Center, and Research Belton Hospital have been a single, integrated enterprise with Health Midwest.

45 3. Nurses United for Improved Patient Care is a labor organization within the meaning of Section 2(5) of the Act.

50 4. By maintaining rules that prohibited employee soliciting protected by Section 7 of the Act during non-work time in areas other than immediate patient care areas Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By maintaining rules that prohibited employee distribution of literature protected by Section 7 of the Act during non-work time and in non-work areas other than in immediate

patient care areas Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5 6. By maintaining rules that required employees to submit literature protected by Section 7 of the Act for management review prior to distribution Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

10 7. By maintaining rules that required employees to secure management permission prior to soliciting protected by Section 7 of the Act or distributing literature protected by Section 7 of the Act Respondents engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

15 8. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

 9. Respondents have not otherwise violated the Act.

Remedy

20 Having found that the Respondents engaged in certain unfair labor practices, I find that Respondents must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because Respondents are a single, integrated enterprise, it is appropriate that all be named on a single notice and that the notice be signed
25 by a representative of Health Midwest, which owns and manages the other employers. Employees at the various facilities will thereby be informed of the remedial action that has been taken at other Health Midwest facilities and of their right to be free of unlawful restraint if they choose to engaged in Section 7 activity at those other facilities. The notice to employees refers to union activity. This is based upon the background of interference with protected union
30 activity established in *Baptist Medical Center*.

 The General Counsel urges that the order require the Respondents to not violate the Act in any other manner. The 2001 – 2002 Rules were issued prior to the Board's decision in *Baptist Medical Center*. The portions of the 2001 – 2002 Rules found to have violated Section
35 8(a)(1) are, in significant measure, not per se unlawful. Moreover, the 2001 – 2002 Rules were superseded by rules not shown to be unlawful. The rules maintained by LRHC and ACH during the 10(b) period are more seriously flawed, but they were not respondents in *Baptist Medical Center*. I conclude that the need for a broader order has not been established.

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended ⁶

50 ⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, individually and collectively and their officers, agents, successors,
 5 and assigns, shall

1. Cease and desist from:

a. Interfering with, restraining, and coercing employees in their exercise of their
 10 rights by maintaining overly broad policies prohibiting soliciting by employees protected by
 Section 7 of the Act during non-work time in areas other than immediate patient care areas.

b. Interfering with, restraining, and coercing employees in their exercise of their
 15 rights by maintaining overly broad policies prohibiting distribution of literature by employees
 protected by Section 7 of the Act during non-work time and in non-work areas other than in
 immediate patient care areas.

c. Interfering with, restraining, and coercing employees in their exercise of their
 20 rights by maintaining policies requiring employees to submit literature protected by Section 7
 of the Act for review prior to distribution.

d. Interfering with, restraining, and coercing employees in their exercise of their
 rights by maintaining policies requiring employees to secure management permission prior to
 soliciting or distributing literature protected by Section 7 of the Act.

e. In any like or related manner interfering with, restraining or coercing employees
 25 in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions, which are necessary to effectuate the policies
 30 of the Act:

a. Within 14 days after service by the Region, post at Respondents' facilities involved
 in this proceeding copies of the attached notice marked "Appendix."⁷ Copies of the notice, on
 forms provided by the Regional Director for Region 17, after being signed by the an authorized
 35 representative of Health Midwest, shall be posted by the Respondents immediately upon receipt
 and maintained for 60 consecutive days in conspicuous places including all places where
 notices to employees are customarily posted. Reasonable steps shall be taken by the
 Respondent to ensure that the notices are not altered, defaced, or covered by any other
 material. In the event that, while these proceedings are pending, the Respondent has gone out
 40 of business or closed one or more any facilities involved in these proceedings, the Respondent
 shall duplicate and mail, at its own expense, a copy of the notice to all current employees and
 former employees employed by the Respondent at the closed facilities at any time since
 April 30, 2002.

⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in
 50 the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted
 Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The
 National Labor Relations Board."

b. Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

Dated, San Francisco, California, December 9, 2003.

Thomas M. Patton
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
of

HEALTH MIDWEST

and

LAFAYETTE REGIONAL HEALTH CENTER
VISITING NURSE SERVICES
MENORAH MEDICAL CENTER
LEE'S SUMMIT HOSPITAL
RESEARCH MEDICAL CENTER
MEDICAL CENTER OF INDEPENDENCE
INDEPENDENCE REGIONAL HEALTH CENTER
ALLEN COUNTY HOSPITAL
BAPTIST LUTHERAN MEDICAL CENTER
OVERLAND PARK REGIONAL MEDICAL CENTER
RESEARCH BELTON HOSPITAL

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule prohibiting employees from soliciting on behalf of a union or engaging in other protected soliciting during non-work time in areas other than immediate patient care areas.

WE WILL NOT maintain any rule prohibiting employees from distributing union literature or engaging in other protected distribution of literature during non-work time and in non-work areas other than in immediate patient care areas.

WE WILL NOT maintain any rule requiring employees to secure management permission prior to soliciting or distributing literature on behalf of a union or engaging in other protected soliciting and distributing.

WE WILL NOT maintain any rule requiring employees to submit union literature or other protected literature for management review prior to distribution.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE HAVE rescinded our overly broad and unlawful no-solicitation/no-distribution policies that were in effect before January 2003.

HEALTH MIDWEST

and

LAFAYETTE REGIONAL HEALTH CENTER
VISITING NURSE SERVICES
MENORAH MEDICAL CENTER
LEE'S SUMMIT HOSPITAL
RESEARCH MEDICAL CENTER
MEDICAL CENTER OF INDEPENDENCE
INDEPENDENCE REGIONAL HEALTH CENTER
ALLEN COUNTY HOSPITAL
BAPTIST LUTHERAN MEDICAL CENTER
OVERLAND PARK REGIONAL MEDICAL CENTER
RESEARCH BELTON HOSPITAL

(Employers)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.